United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-1388

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FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

vs.

MAURICE BURSE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

PETITION BY THE UNITED STATES OF AMERICA FOR REHEARING

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Preliminary Statement

The United States of America respectfully petitions for rehearing of the decision of this Court (Smith, Anderson and Kaufman, C.J.J.) filed March 8, 1976, reversing the conviction of Maurice Burse on the charge of conspiracy to rob a federally insured bank in violation of Title 18, United States Code, §2113(b).

Reasons for this Petition

This Court reversed the conviction of defendant Maurice Burse on the grounds that the Trial Court's failure to give an alibi instruction requested by the defense was error and that the remarks made by the First Assistant United States Attorney during summation amounted to reversible error. It is respectfully submitted

that from its opinion it appears that this Court may not have taken into account the facts that Burse's alibi did not cover the specific time of the robbery and that the Government's case consisted of corroborated evidence of the defendant's participation both before and after the robbery together with evidence of his presence at the scene. In addition, this Court in specifically citing the First Assistant United States Attorney for prosecutorial impropriety apparently did not consider curative instructions given and may have viewed the remarks made during summation out of context and, in part, was mistaken as to the arguments themselves.

Consequently, its criticism is exceedingly damaging to the prosecutor's personal and professional reputation.

Thus, we sincerely request this Court to carefully reconsider its decision and its manner of criticism of the First Assistant United States Attorney.

ARGUMENT

I. The facts of this case do not warrant the giving of the requested alibi instruction.

This Court's opinion states that the evidence indicated "... that Burse was not at the scene of the crime but was cleaning up his family's yard at the time of the robbery ..." Slip op. at 2508. It is respectfully submitted that this is a mistaken account of the testimony. None of the three defense witnesses could specifically account for the presence of the defendant at his home between 10:00 A.M. and 10:30 A.M., when the robbery of the bank occurred. Louise Stevens, a neighbor, testified that she first saw Burse not earlier that 11:15 A.M. and as late as 11:45 A.M. (Tr. 650, 654-655). The defendant's mother and

brother could account for him only "off and on" before noon (Tr. 597-598, 608, 691-693). Clearly, this does not establish alibi.

The Government concurs with this Court that, as a general rule, the alibi instruction should be given where there is an alibi defense. However, failure to give such instruction, *per se*, is not reversible error.* See *United States* v. *Couglin*, ... F.2d .... (2d Cir. April 15, 1975), slip op. at 2895; *United States* v. *Lee*, 483 F.2d 968 (5th Cir. 1973); *United States* v. *Beck*, 431 F.2d 536, 538 (5th Cir. 1970); *United States* v. *Cole*, 453 F.2d 902 (8th Cir. 1972); *United States* v. *Erlenbaugh*, 452 F.2d 967 (7th Cir. 1971); *aff'd on other grounds*, 409 U.S. 239 (1972). In light of the testimony of the Government's witnesses (Tr. 353-359; 225-226, 360; 371, 375, 483), it is respectfully submitted that this Court should recognize the exceptions that where the evidence in support of the alibi defense is not strong or where, as here, the defendant's presence at the scene of the crime is not an element of the crime charged, the failure to provide an alibi instruction does not require reversal.

II. The Government summation was proper.

It is respectfully requested that this Court review its decision as to the Government's summation in light of the following:

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* This Court cites *United States* v. *Megna*, 450 F.2d 511 (5th Cir. 1971), *reh. denied* (12/30/71) in support of the proposition that an alibi instruction should have been given in the instant case. The Fifth Circuit in *Megna* found the alibi raised to be a cognizable defense only to the substantive offense. Together with *Beck* and *Lee*, *supra*, *Megna* only can be read as requiring the giving of an alibi instruction where presence is an essential element of the crime charged and thus, is supportive of the Government's position.

(a) In his summation, First Assistant United States Attorney William M. Skretny asked the jury to consider the fact that Government witness, co-conspirator Darrell DeBose, was in custody when interviewed by defense counsel. This Court held that such reference to the witness' incarceration was an attempt to refurbish the credibility of the witness by implying that he had already served his term in jail when he had not (Slip op. at 2512).

The Government admits that though it did not intend to mislead the jury into believing that Darrell DeBose already had been sentenced, its remark was sufficiently ambiguous for the jury to so believe. However, it should be noted that this Court apparently did not consider the mitigating effect of the Trial Court's curative instructions (Tr. Summ. 7, 8) and of the Government's caveat to the jury that Darrell DeBose had not yet been sentenced and that ". . . the Court can consider credibility of Darrell DeBose in sentencing . . ." (Tr. Summ. 23).

(b) Comment was made in the summation by the Government to an increase in the number of people who rob banks (Tr. Summ. 17). In the view of this Court, this "left open the inference" that the reference to this general trend constituted evidence of the defendant's guilt. However, it is clear from the context of the following argument that it relates specifically to the Government's witness Darrell DeBose and not to the defendant:

> . . . the government must take its witnesses as it finds them. It has no choice in the matter. Unfortunately, there are people who rob banks and it appears to be more and more people all the time (Tr. Summ. 17).

In retrospect, it would have been more judicious if the reference to other people who rob banks were not made. However, give the context in which it was employed, it

amounts to no more than saying, in effect, "we take our witnesses as we find them—we can't help it that people rob banks and that there are more and more people like Darrell DeBose". Moreover, in a case involving narcotics, this Court upheld the propriety of a similar comment made in summation relating to the "problems of drugs" and drew no prejudicial inference. *United States* v. *Wilner,* 523 F.2d 68, 73 (2nd Cir. 1975). *See also United States* v. *Wingate,* 520 F.2d 309, 316-317 (2nd Cir. 1975); *United States* v. *Tortora,* 464 F.2d 1202, 1207 (2nd Cir. 1972).

(c) From the phrase "the defendant didn't tell you about all of the truths" (Tr. Summ. 25), this Court concluded that it implied that the defendant's failure to provide proof of innocence was to be taken as evidence of guilt and further that the phrase came dangerously close to a comment on the defendant's failure to take the stand. Slip op. at 2512. This conclusion, we respectfully submit, is unfair.

In his summation, First Assistant United States Attorney William M. Skretny corrected his mistake in referring to the defendant by stating to the jury that he meant the defense attorney (Tr. Summ. 23, 24, 26). This does not lend itself to the aforementioned conclusions drawn by this Court and should not be considered prejudicial. See *United States* v. *Anderson,* 481 F.2d 685, 701 (4th Cir. 1973). Moreover, after the Court's curative instructions (Tr. Summ. 25), Mr. Skretny apologized to the Court and Jury, stating, "I am sorry, Judge. I didn't mean to infer that" (Tr. Summ. 26) and thus, to view the aforementioned comment of the prosecutor as improper or as a deliberate attempt to violate a fundamental right of the defendant is again unfair. See *United States* v. *Adamo, et al.,* ..... F2d ..... (3rd Cir. January 12, 1976), slip op. at 16-17.

(d) In its opinion, this Court criticized the Government for referring to portions of a signed statement of its own witness, Darrell DeBose, which had not been received into evidence. Generally, it is not proper to refer during summation to exhibits not received into evidence. cf. *United States* v. *Estremera,* ..... F.2d ....., Slip op. 484 at 1704, 1705 (2nd Cir. 2/2/76); *United States* v. *Hickman,* 468 F.2d 610, 611 (5th Cir. 1972). In the instant case, the correct approach would have been to object during the summation of defense counsel to his improper reference to the same non-admitted statement of Darrell DeBose rather than attempt to neutralize that reference with the Government's remarks criticized herein.

Admittedly, the Government attempted a reference to a portion of DeBose's statement but was precluded from arguing its contents by defense counsel's immediate objection and the Trial Court's curative instruction (Tr. Summ. 27). These measures, we submit, were sufficient to prevent prejudice.

(e) This Court raises in its Opinion the propriety of the comments that ". . . Mr. Stephens tried to get Barbara Ramos to say . . ." (Tr. Summ. 28) and Mr. Stephens "attempted to give you (the jury) the impression that . . ." (Tr. Summ. 38) and concludes that they potentially were derogatory of the defendant's lawyer. The record, we respectfully submit, rejects both findings.

The comment "Mr. Stephens tried to get Barbara Ramos to say" simply recalled for the jury the following unsuccessful cross-examination of that witness (Tr. 548-549).

Moreover, as to the second comment criticized, this Court unfairly creates the impression that the Government specifically referred to Mr. Stephens when, in fact, all it said was *"It was attempted to give you the impression that* it

was Craig Burse that Barbara Ramos saw at the Friendship House and it wasn't—" (emphasis added). The Government's purpose was directed to the cross-examination of Barbara Ramos (Tr. 547-549), the direct examination of Craig Burse (Tr. 681, 682) and the defense closing statement (Tr. 777) not to the defense lawyer himself.

It is disquieting that this Court attributes to either of these comments an attempt to impugn the reputation of Mr. Stephens and we assure this Court that such was not intended.

(f) As another example of alleged prosecutorial impropriety, this Court mentions that the Trial Court "on its own initiative, felt compelled to tell the jury that the prosecution may have misrepresented certain testimony presented earlier in the trial" and that "on several occasions, the Court cautioned the jury that the Government's closing argument was replete with speculation which the jury was bound to disregard." Slip op. at 2513. This is not supported by the record.

As to the issue of alleged misrepresentation, the Trial Court only twice *sua sponte* interrupted the Government's summation. On the first occasion, the Trial Court merely remarked that perhaps the complete conversation had between witness Barbara Ramos and the defendant who was picked up by her while hitchhiking was not being argued by the government (Tr. Summ. 35).

On the second occasion, the Trial Court during the Government's argument relating to Louise Stevens interjected that the jurors should rely on their recollection of what was said (Tr. Summ. 39, 40, 41).

Contrary to this Court's assertion as to speculation, at no time did the Trial Court caution that ". . . the government's closing argument was replete with 'speculation' which the jury was bound to disregard."

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The defense did make two objections related to speculation. Defense counsel during summation urged the jurors to infer from the absence of a photograph of the defendant in the bank surveillance film, that the defendant had not been present during the robbery (Tr. 794, 795). The Government in rebuttal proffered the following argument which met with objection:

> . . . the reason why Maurice Burse's photograph was not on the film was because after the bait money was pulled, the cameras were only activated at that time, a time when Maurice Burse was no longer in the bank (Tr. Summ. 37).

Assuming *arguendo* that such rebuttal argument may be speculative, this Court apparently failed to consider the mitigating effect of the Trial Court's interposition of its belief that this comment

> . . . is simply speculation on Mr. Skretny's part and you should reject the argument (Tr. Summ. 37).

The other portion of the Government's summation at issue is the following:

> . . . Darrell DeBose and defendant Maurice Burse are charged as principals, as acting in concert to take by intimidation the $410, and we submit to you that it is clear, it is stipulated, and recall the testimony of both teller Helen Jurek—

Defense objection was made to "it is stipulated" (Tr. Summ. 14). The Trial Court thereupon stated,

> "It is up to the jury to determine what the evidence was about the amount of money." (Tr. Summ. 15).

(g) It respectfully is brought to this Court's attention, that it was not stated during summation that Louise Stevens "admitted to being drunk on the day of the robbery and on the day she testified in court". Slip op. at 2513. The following argument was made:

> Let's look at Louise Stevens, a witness that the defense didn't mention at all. We submit to you that it is because she had nothing to contribute at all. Mrs. Stevens testified that she was under influence of alcohol on the day in question. Tr. Summ. 39.
>
> And she further testified that she was under the influence of alcohol today. Tr. Summ. 40.

Nowhere did the Government employ the pejorative term "drunk" as alleged in this Court's opinion and certainly the Trial Court's curative instruction sufficed to dispel any ambiguity.

(h) Finally, this Court *sua sponte* states that the Government's use of "we know" and "is true" constitutes an attempt had within its possession evidence of the defendant's guilt which had not been given to the jury. But for one instance (Tr. Summ. 25), the Government always made reference to the testimony of witnesses upon which it based its arguments that certain facts are true (Tr. Summ. 9, 12, 20, 21, 24-25, 30, 32) and thus, there existed no ambiguity that could sugest to the jury that "the government had within its possession evidence of Burse's guilt which had not been given to the jury."

Finally, this Court analogizes to the conduct of the First Assistant in this case to that of the Government's in *Berger* v. *United States*, 295 U.S. 78 (1935) and suggests that the language quoted from that opinion is a "perfect description of the facts in the instant case". Slip op. at 2514. The instant case is not identical to the *Berger* one in two crucial respects which we respectfully submit were not considered by this Court. In *Berger*, the prosecutor egregiously violated the norms of prosecutorial propriety during both cross examination and summation. The conduct in *Berger* speaks for itself. No conduct of the Government during the instant trial was even remotely tantamount to the excesses in *Berger*. Secondarily, the *Berger* Court observed that though the trial judge sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them,

> ... the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken. 295 U.S. at 85.

Not only was the Government's summation here vastly dissimilar in degree to that of the prosecutor in *Berger*, but the Trial Court's admonitions and curative instructions in the present case were more than sufficient in precluding the possibilities of prejudice to the defendant.

This Court by its Opinion, in effect has accused the prosecutor of intentional misstatements of facts, comments on the defendant's constitutional right not to testify, derogatory remarks against defense counsel, and of attempts to inform the jury that the Government had within its possession additional evidence of the defendant's guilt. Such accusations are not justified and are professionally damaging. Thus, we respectfully urge this Court to give this matter its every consideration.

Conclusion.

For the reasons stated, it respectfully is submitted that this Court re-examine its findings as to the lack of an alibi instruction and reconsider its denunciation of the First Assistant and his summation in light of the within discussion.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
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RE: USA
vs
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Leslie R. Johnson

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Patricia A. Lacey

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